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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

LAMPF PLEVA LIPKIND PRUPIS & PETIGROW,

Petitioner,

-v.-

JOHN GILBERTSON *ET AL.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR AMERICAN COUNCIL OF LIFE INSURANCE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICUS*

The American Council of Life Insurance (hereinafter "Council") is the largest non-profit life insurance trade association in the United States. Its membership of 635 life insurance companies holds, in the aggregate, 95% of the assets of all the United States life insurance companies. Life insurance companies are among the

country's major financial intermediaries and are, therefore, engaged continually in the purchase and sale of securities. For that reason, they are likely to be involved, either as plaintiffs or defendants, in actions brought under Section 10 of the Securities Exchange Act of 1934 and Rule 10b-5. They have an interest, accordingly, in the elimination of the uncertainty and confusion that now exists with respect to the limitations periods applicable to such actions and in the establishment of a uniform and appropriate limitations period. This case offers the Court the opportunity to achieve that objective.[1/]

SUMMARY OF ARGUMENT

The ACLI strongly supports petitioner's principal arguments in this case: (1) that the appropriate limitations period for actions under Section 10 of the Securities Exchange Act of 1934 (the 1934 Act) should be found in federal rather than state law and (2) that the appropriate federal limitations period for such actions is the one-year/three-year provision found in Section 9(e) of the 1934 Act. Since we have little to add to the petitioner's brief and the briefs of the other *amici* on these issues, Parts I and II limit themselves to very brief comments about certain aspects of those two issues. We suggest, in Part I, that rather than creating a few exceptions to the general rule that limitations periods for federal actions will be found, when needed, in analogous state statutes, this Court has been moving toward establishing a sounder, more rational rule, and should

1/ The written consents of the parties to the filing of this brief have been filed with the Clerk of the Court.

continue to do so. In Part II we contend that the reasons offered by the Securities and Exchange Commission for adopting a five-year limitations period are unpersuasive.

In Part III, we argue that it is wholly appropriate for the Court to provide guidance to the lower courts that must apply the factors in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07 (1971), in determining whether the ruling that we anticipate in favor of the federal limitations period found in Section 9(e) of the 1934 Act should be applied retroactively or prospectively only. In particular, we urge the Court to make clear that no Circuit authority in favor of a different state limitations period could be considered "established" once the bar was on notice of this Court's decision in *Agency Holding Corp.* v. *Malley-Duff & Associates*, 483 U.S. 143 (1987). Such guidance would provide a uniform and desirable base point for retroactivity analysis and greatly minimize unnecessary litigation.

ARGUMENT

I. The Appropriate Limitations Period for Section 10 Actions Should Be Found in Federal Rather Than State Law.

This case provides the Court with another opportunity, following *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151 (1983), *Agency Holding Corp.* v. *Malley-Duff & Associates*, 483 U.S. 143 (1987), and *Reed* v. *United Transportation Union*, 488 U.S. 319 (1989), to continue the process of reducing the confusion and

uncertainty concerning the periods of limitations applicable to claims for relief established by federal law. Justice Scalia, in an erudite concurrence in *Agency Holding*, a civil RICO action, showed how the rationale for the "general rule" -- that where Congress has inexplicably failed to provide a limitations period for a civil action expressly created by statute (and, necessarily, where there is no limitations period for an implied right of action), the period applied by the forum state to the most similar state action will be applied -- has changed dramatically since this rule was first adopted. Justice Scalia, however, argued against further change, and against the adoption of a sounder rationale, one that would eliminate the inconsistent and unpredictable results that application of this general rule has spawned.[2/]

The modest change in the general rule effected by *DelCostello*, *Agency Holding*, *Wilson* v. *Garcia*, 471 U.S. 261 (1985), and *Reed* v. *United Transportation Union*, is based, we submit, upon a fundamental change in the rationale for the rule. Where it appears, as it does in many cases, that Congress has simply failed, inexplicably, to adopt a limitations period, the Court no longer presumes that Congress intended that courts borrow the analogous state limitations period. Rather, the Court recognizes, correctly in our view, that with an aberrant exception or two, a limitations period for a civil action is an integral part of the "genius of our laws," *Adams* v. *Woods*, 6 U.S. (2 Cranch) 336, 342 (1805), and that the

2/ The opinion of the Court of Appeals for the Second Circuit in *Ceres Partners* v. *GEL Associates*, __ F.2d __ (No. 89-7666) (Nov. 8, 1990), describes in detail the confusion that the general rule has caused in that circuit, in actions brought under Section 10 of the 1934 Act and Rule 10b-5.

adoption of an appropriate period is as much a part of the "interstitial lawmaking" of the federal common law (*DelCostello*, 462 U.S. at 172) as the fashioning of the substantive elements of the federal claims for relief established expressly or impliedly by Congress.[3/]

We see no reason to paraphrase or summarize here the extensive demonstrations that will be made in the briefs of the petitioner and of other *amici*, and which have already been made in the well considered opinions of three courts of appeals that have considered this issue, that explain why federal law, more particularly the Securities Exchange Act of 1934, "'clearly provides a closer analogy than available state statutes.'" *Reed* v. *United Transportation Union*, 488 U.S. at 324 (quoting *DelCostello*, 482 U.S. at 172).

II. The Limitation Period Provided for Actions Brought Under Section 9 of the Exchange Act Should Be Adopted for Actions Brought Under Section 10.

Similarly, we believe we can add little to the briefs that will be filed by the petitioner and supporting *amici* on the issue of whether actions authorized by Section 9(e) of the 1934 Act provide the closest analogy to actions under Section 10 of that Act, so as to make appropriate the adoption of the one and three year limitations periods set forth in Section 9. We limit ourselves, therefore, to a brief comment upon the position urged in

3/ The requirement of scienter on the part of the defendant, first set forth in *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185 (1976), is an apposite example of the development of a federal common law that gives content to a broad and generally phrased statute.

the *amicus* brief that we are advised will be filed by the Securities and Exchange Commission. The Commission contends that this Court should apply here the five-year limitations period set forth in Section 20A of the 1934 Act, added by the Insider Trading and Securities Fraud Enforcement Act of 1988. Prior to the 1988 Act, claims based upon the improper use of non-public material information had indeed been brought under Rule 10b-5, and the 1988 Act was intended both to codify the court decisions upholding such actions and to overturn others which had denied relief in certain circumstances. H.R. Rep. No. 910, 100th Cong., 1st Sess. 26 (1988). That Act also provided for the same five-year limitations period already applicable to treble damage actions brought by the Commission under the Insider Trading Sanctions Act of 1984. See H.R. Rep. No. 355, 98th Cong., 2nd Sess. 30 (1984).

The Commission's position (based upon our reading of earlier *amicus* briefs filed by it) appears to rest largely upon its belief that private rights of action are an important part of the enforcement of the securities laws and that the longer the limitations period the better the enforcement. This approach ignores altogether the doctrine laid down by this Court in the cases cited above. It is rather the most closely analogous limitations period that must be sought and not the one that favors plaintiffs who have delayed filing their actions and that problematically supports the policies of the Act.[4/]

4/ In many cases it would be possible for a plaintiff with a possibly sound claim under Rule 10b-5 to wait to see whether the price of a security increases to the point where the profits exceed the probable damage. Providing plaintiffs with such a "free ride" is assuredly not one of the policies of the 1934 Act.

There is no basis, moreover, for the conclusion that the longer the limitations period the better served investors and the public will be. Long ago this Court emphasized that statutes of limitation are entitled to strict enforcement and that protection against stale claims and the consequent unavailability of relevant evidence effectuates a significant public policy.

> "Statutes of limitation are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together." *Wood* v. *Carpenter*, 101 U.S. 135, 139 (1879).

Finally, it should be noted that when the Insider Trading and Securities Fraud Enforcement Act was under consideration, the Commission was surely aware of this Court's decisions in *DelCostello* and *Agency Holding*. It was also aware of the extensive criticism of the "borrow from the states" doctrine in Rule 10b-5 cases set forth in the American Bar Association's *Report of the Task Force on Statute of Limitation for Implied Actions*, 41 Bus. Law. 645 (1986) and, indeed, it appears that the Commission shared the views of the ABA. The Commission was aware that the bill under consideration provided a limitations period for contemporaneous insider trading actions.

It was aware, finally, of the remarkably close similarity of the express right of action under Section 9, in respect of transactions in exchange-listed securities, to the implied right of action under Section 10 in respect of transactions in other securities. Had the Commission believed a five-year limitations period to be appropriate, it would have been simple enough to suggest to the Congress that it consider the adoption of a limitations period for all Section 10 actions. In the absence of any such suggestion or independent action by the Congress, however, it must be assumed that the Commission and the Congress expected the doctrines set forth in the recent decisions of this Court to be applied. That expectation should now be fulfilled.

III. The Court Should Eliminate Continued Uncertainty and Confusion by Providing Guidance as to the Retroactive Applicability of Its Decision.

Assuming that this Court accepts petitioner's argument and adopts the one-year/three-year statute of limitations in § 9(e) of the Securities Exchange Act for Rule 10b-5 actions, respondents have represented that they will ask the Court to rule that the decision should not be applied retroactively to their own circumstances. Br. in Opp. at 10. We leave that issue to the briefs of the parties. We urge the Court, however, to make clear that its holding is, at the very least, retroactive to the date of decision in *Agency Holding Corp.* v. *Malley-Duff & Associates*, 483 U.S. 143 (1987) -- June 22, 1987.

We recognize that, under other circumstances, the question of whether a new rule that overturns another of

long standing should be applied prospectively or retroactively is left to the lower courts, to be determined by the application of the factors set forth in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-07 (1971). That is because, as the Court will recall, the issue may be determined differently in different jurisdictions depending upon the state of the applicable law at the time the actions were brought. Here, as we shall show, application of *Chevron* calls for a uniform nation-wide rule, so it is particularly appropriate for the Court to discuss this matter in its opinion. Otherwise, there will be continued litigation over retroactivity and, in many cases, over which state law to apply. Since one result of a decision by this Court to apply the limitations provision of Section 9(e) -- and perhaps also an objective of the decision -- will be to eliminate the unfortunate morass that the past 40 years have created, it would further the desirable effect of the decision by bringing the unnecessary litigation to an end sooner, rather than later.

Chevron Oil set forth three factors for deciding whether a court decision should be applied retroactively or prospectively only: (1) whether the decision establishes "a new principle of law, either by overruling clear past precedent on which litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed"; (2) whether retroactive operation of the rule in dispute "'will further or retard its operation'"; and (3) whether retroactive operation of the rule "'could produce substantial inequitable results.'" 404 U.S. at 106-07 (citations omitted). See *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 87-88 (1982). The Court in *Chevron* applied those factors to hold that a one-year state statute of limitations

made applicable to plaintiff's off-shore injury by the then-recent decision of this Court in *Rodrigue* v. *Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), should not be made applicable to a pre-*Rodrigue* case, where *Rodrigue* had effectively overruled a long line of decisions by the Fifth Circuit. The Court explained the rationale for its decision: "It cannot be assumed that [plaintiff] did or could foresee that this consistent interpretation of the Lands Act would be overturned." 404 U.S. at 107.

More recently, in 1987, this Court reviewed two decisions of the Third Circuit relating to the retroactivity of that Circuit's ruling, in light of *Wilson* v. *Garcia*, 471 U.S. 261 (1985), that § 1981 actions in Pennsylvania are governed by that State's two-year limitations period governing personal injury actions, rather than that state's six-year statute of limitations. In *Saint Francis College* v. *Al-Khazraji*, 481 U.S. 604 (1987), this Court affirmed the Third Circuit's decision that plaintiffs' action, brought in 1980, was not time-barred under the new rule, finding the Third Circuit's decision an appropriate application of the *Chevron Oil* rule that a newly applicable statute of limitations should be applied only prospectively when the Court "overruled clearly established Circuit precedent on which the complaining party was entitled to rely * * *." 481 U.S. at 608. In the second case, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656 (1987), this Court affirmed a contrary decision by the Third Circuit to apply the new rule to plaintiffs' case, which had been filed in 1973, at which time "'there was no established precedent in the Third Circuit to indicate the appropriate limitations period for Section 1981 claims.'" 482 U.S. at 663, quoting the Third Circuit decision.

In a very recent decision, *American Trucking Associations, Inc.* v. *Smith*, 110 S. Ct. 2323 (1990), this Court reaffirmed the *Chevron* approach. "As *Chevron Oil* makes clear, the purpose of the doctrine is to avoid '"injustice or hardship"' to civil litigants who have justifiably relied on prior law." 110 S. Ct. at 2342.

These decisions make clear that, if this Court should decide that the one-year/three-year provision in § 9(e) of the 1934 Act governs Rule 10b-5 actions, the decision should be applied retroactively to suits brought prior to the date of the decision, except in those instances when potential plaintiffs might reasonably have relied on established Circuit precedent that specified a different statute of limitations. As we suggest above, what constituted "established Circuit precedent" should, at least after June 1987, be decided in the same way in every Circuit rather than on a Circuit by Circuit basis.

The Court's decision in *Agency Holding* was a clear signal to the bar, and particularly to the securities bar, that the appropriateness of borrowing a state statute of limitations for Rule 10b-5 actions -- an issue that had not yet been decided by this Court -- was an open question. In that case, the Court found significant that a 1985 American Bar Association RICO task force had "described the current state of the law regarding the applicable statue of limitations for civil RICO claims as 'confused, inconsistent, and unpredictable,'" 483 U.S. at 148, and concluded that "a uniform statute of limitations is required to avoid intolerable 'uncertainty and time-consuming litigation.'" *Id.* at 150, quoting *Wilson* v. *Garcia*, 471 U.S. at 272. Because RICO cases commonly involve interstate transactions, and thus the statute of

limitations of several States could govern any given RICO claim, and because there was "no comparable single state law analogue to RICO," 483 U.S. at 152, the Court in *Agency Holding* concluded that the "federal policies at stake and the practicalities of litigation" counseled in favor of the limitations period of the analogous Clayton Act as "a significantly more appropriate statute of limitations than any state limitations period." *Id.* at 153.

The implications of this analysis for Rule 10b-5 actions must have been apparent to every competent lawyer as soon as the decision became widely known. Another ABA task force had just published (in February 1986) a report on the statutes of limitations for Rule 10b-5 actions, demonstrating that application of state statutes of limitations in such actions has "resulted in myriad inconsistent federal court decisions," in "disarray" that "serves no public purpose," and in "uncertainty and lack of uniformity" that promotes forum shopping by plaintiffs and results in "wholly unjustified disparities in the rights of parties litigating identical claims in different states." Committee on Federal Regulation of Securities, *Report of the Task Force on Statute of Limitations for Implied Actions*, 41 Bus. Law. 645, 646-47 (1986). Indeed, the report went on, "Vast amounts of judicial time and attorneys' fees are wasted," and "managements of publicly held companies, as well as their auditors and attorneys, are frequently unable to assess the impact of possible litigation under rule 10b-5." *Id.* at 647.

The extent to which this accurate description of the relevant history points directly to the adoption of a federal limitations period in this case is of course explained at length in the briefs of the parties, and we

shall not elaborate further. The point is simply that after the announcement of the decision in *Agency Holding*, on the heels of this well-publicized ABA report, any competent lawyer, contemplating the filing of a Rule 10b-5 action and looking at the applicable limitations period, would necessarily have concluded that current reliability of existing Circuit authority -- no matter how apparently well-established -- was now in doubt, and would remain in doubt until this Court decided a case such as this one or possibly until a number of circuits had revisited the matter, made uniform decisions, and this Court, by repeated denials of certiorari, signalled that it was not likely to act further.

In the typical case, a potential Rule 10b-5 plaintiff will consult a lawyer about the possibility of suing. Under Rule 11 of the Federal Rules of Civil Procedure, the lawyer or party signing a pleading is responsible for ensuring that there has been "reasonable inquiry" to establish, *inter alia*, that the lawsuit is well-grounded in fact. Since the amount of time available for such inquiry depends on the applicable statute of limitations, any lawyer will attempt to determine as soon as possible what statute of limitations applies. Such a lawyer, after *Agency Holding*, would have recognized that existing Circuit authority was now in doubt.[5/] This conclusion is

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5/ In fairness to lawyers and their clients, we do not believe that established Circuit court authority adopting a state statute of limitations for Rule 10b-5 actions became unsettled on the very date of the decision in *Agency Holding*, June 22, 1987. Because the decision was not, in fact, in the securities area, a decent interval should be allowed during which reliance on established Circuit court authority remains presumptively reasonable. We suggest three months after the *Agency Holding* decision for the length of such "grace period."

confirmed by the speed with which the Third Circuit was urged to read *Agency Holding* as requiring adoption of the federal one-year/three-year limitations period for Rule 10b-5 actions and the speed with which that Court -- less than one year after *Agency Holding* -- agreed. *In re Data Access Systems Securities Litigation*, 843 F.2d 1537 (3d Cir., April 8, 1988) (*en banc*), *cert. denied sub. nom. Vitiello v. I. Kahlowsky & Co.*, 488 U.S. 849 (1988).[6]

Accordingly, this Court should make clear in its decision in favor of the one-year/three-year statute of limitations in § 9(e) of the 1934 Act that its ruling will be retroactive, at the very least, to the date of general publication of this Court's decision in *Agency Holding*.

CONCLUSION

For the foregoing reasons, the American Council of Life Insurance respectfully submits that this Court should rule that the one-year/three-year statute of limitations in Section 9(e) of the Securities Exchange Act of 1934 is applicable to Rule 10b-5 actions and further that it should provide the guidance suggested above to the lower

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6/ The rule that we urge the Court to adopt is consistent with the holdings in *Saint Francis College*, *supra*, because the action in that case had been brought in 1980, well before this Court's 1985 decision in *Wilson* v. *Garcia* put lawyers on notice that civil rights actions under statutes closely related to § 1983 were likely to be subjected to the state statutes of limitation applicable to personal injury claims, in spite of existing circuit court authority to the contrary. Thus this Court did not rule that lawyers can continue to rely on circuit authority even when a recent decision of the Supreme Court has put that authority in serious question.

courts with respect to the retroactive applicability of its decision.

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